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February 14, 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Ex Parte

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: ET Docket No. 90-314

Dear Mr. Caton:

In accordance with Commission rules, please be advised that yesterday, Wayne Watts, Al Richter, Rick Firestone and the undersigned, representing SBC Communications Inc., met with Michele Farquhar, Barbara Esbin, David Nall, Peter Tenhula and Chris Wright to discuss Section 22.903 of the Commission's rules, including issues in the above-referenced docket. Specifically, we discussed how 22.903 would be impacted in light of the U.S. Court of Appeals (Sixth Circuit) decision dealing with this rule. Attached are handouts provided in the meeting.

If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael W. Bennett", written over a horizontal line.

cc: Ms. Farquhar  
Ms. Esbin  
Mr. Nall  
Mr. Tenhula  
Mr. Wright

10-15-96-1000  
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Q#1

February 13, 1996

In the Matter of )  
 )  
Amendment of the Commission's ) GEN Docket No. 90-314  
Rules to Establish New Personal )  
Communications Services )

Ex Parte Presentation of  
SBC Communications Inc. ("SBC")

The public interest would be served by -- and the Commission is now required to proceed rapidly to consider -- the elimination of the cellular structural separation requirements of Section 22.903, in light of:

- the Commission's decision not to impose structural separation for PCS while retaining it for cellular;
- the Sixth Circuit's finding that that decision was "arbitrary and capricious" and its command that the FCC act now;
- the dynamic market forces underway today, and the regulatory anomalies created by a continuation of the cellular structural separation requirements particularly in light of the new legislation which eliminates the joint marketing restriction; and
- the fact that existing non-structural safeguards are fully adequate to address any remaining concerns regarding cross-subsidization or interconnection discrimination.

At a minimum, immediate interim relief is necessary and appropriate at this time.

The existing separation rule -- which applies only to the Bell Operating Companies (BOCs) and only to cellular service -- harms consumers and inhibits competition.

- It harms consumers because it deprives them of the benefits of integrated services and one-stop shopping, which the Commission has recognized on numerous occasions.
- In the absence of the rule, BOC customers would enjoy the option of a single point of contact for all purposes, including both wired and wireless services; they could obtain CPE as well as repair and maintenance services from the same personnel; they could use and pay for only a single voice mailbox serving multiple phones; and they could receive and pay only one bill.

The rule inhibits competition by requiring inefficiencies in the operations of the BOCs, which adds costs to consumers, and the rule fosters a number of regulatory anomalies. For example:

- GTE, one of the largest local exchange carriers, is not required to provide cellular service on a separated basis;
- The new PCS licensees are not required to operate separate from their local exchange affiliates; and
- In one county in Oklahoma, where SWBT is the local exchange carrier, it is allowed to integrate with SBMS's PCS service but prohibited from integrating with SBMS's cellular service in the same county.

Since the new legislation eliminates a significant aspect of the rule (by permitting joint marketing), the remaining portions of the rule simply impose unnecessary costs to achieve objectives which are adequately addressed through other means (i.e., through the non-structural safeguards).

For the foregoing reasons, the Commission should:

- ° reject the recent suggestion by AirTouch, Comcast and Cox that the Sixth Circuit decision requires the Commission to undertake a wide-ranging inquiry regarding "both the cellular structural and PCS non-structural rules"; and
- ° issue promptly a further notice of proposed rulemaking directed specifically at eliminating Section 22.903 (in whole or in part) as, in fact, the Sixth Circuit has directed.

Either before, or at the outset of this new proceeding -- which must be highly expedited under the 6th Circuit's mandate -- the Commission should immediately grant interim relief on its own motion, consisting of:

- ° a waiver, applicable to all BOCs, of subsections (b)(2), (b)(3) and (b)(4) of Section 22.903;
- ° an amendment to the definition of "BOC" for purposes of subsection (d) to make clear that "BOC" only means the LEC affiliate (as was the case under former Section 22.901); and
- ° an extension to all BOC cellular affiliates of the recent CLLE waiver granted to SBMS.

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Exhibits:   1 - Fin-Syn NPRM  
             2 - Draft Section 22.903 NPRM  
             3 - Forum Attendees  
             4 - Customer Brochures

I. **BACKGROUND**

- ° In the Broadband PCS Order in this proceeding, the FCC determined that "no new separate subsidiary requirements are necessary for LECs (including BOCs) that provide PCS." It found that there are substantial benefits to be derived from the combined offering of local exchange and PCS service and that the existing non-structural safeguards are sufficient to deter any potential discrimination and cross-subsidization. Broadband PCS Order, 8 FCC Rcd. 7700 at ¶¶ 112-27.

- ° At the same time, however, while recognizing the close similarity between PCS and cellular (which the FCC has recognized both in this proceeding and in the separate CMRS Docket 93-252), the Commission nevertheless concluded that:

With regard to the structural separation requirement for BOCs and their cellular operations . . . , we do not believe the record in this proceeding provides enough information for us to eliminate the requirement at this time. . . . Id. at ¶ 126 n. 98.

- The Commission reached this conclusion notwithstanding the facts that: (a) the NPRM which preceded the Broadband PCS Order specifically solicited comments on whether structural separation should be eliminated for BOC cellular service (NPRM and Tentative Decision, 7 FCC Rcd 5676 at ¶ 76); (b) numerous parties commented on that question (including Ameritech, BellSouth, McCaw, NTIA, and NYNEX) and demonstrated why the rule should be eliminated; and (c) the few commenting parties who opposed elimination of the rule did so with nothing more than brief, conclusory statements which did not even address the fundamental reality that the non-structural safeguards already in place are fully adequate to address the concerns underlying the structural separation rule.
- On November 9, 1995, the 6th Circuit held that the Commission's failure to reconsider the BOC cellular structural separation rule -- and its failure to "[explain] . . . why it believed the record [was] insufficient to eliminate the structural separation rule, even in light of the fact that it found the requirement unnecessary in the

[PCS] context" -- was "arbitrary and capricious." Cincinnati Bell Telephone Co. et al. v. FCC et al., Docket Nos. 94-3701, et al., slip. op. at pp. 26, 28 (6th Cir., Nov. 9, 1995) ("Cincinnati Bell").

- The Court stated that "the time is now" for the FCC to reconsider whether to rescind the structural separation requirements and it said that "time is of the essence on this issue." Id. at pp. 28, 29.
- In its recent decision granting SBMS's CLLE service waiver, the Commission recognized that structural separation of competitive local exchange and cellular service out of region is unnecessary. MO&O in Docket No. CWD-95-5 (released Oct 25, 1995).
- SBC believes that the existing record in this and several other proceedings amply demonstrate that this same result should be reached with respect to the joint provision of local exchange and cellular service in region, since: (a) the existing non-structural safeguards



are fully adequate to address any potential discrimination and cross-subsidy concerns in region, which are the reasons for the structural separation requirements; (b) the same public interest benefits the Commission relied on in concluding that PCS could be integrated with BOC LEC activities apply equally to cellular; and (c) there is no reason to treat BOC cellular and PCS operations differently or to disadvantage BOC cellular operations competing with PCS and non-BOC cellular service providers.

- ° Therefore, in order to comply with the 6th Circuit's requirement for timely FCC action, and in light of the existing record already before the Commission in this and numerous other proceedings, SBC believes that the Commission can, and must, at a minimum:

- (a) promptly issue a further NPRM specifically directed at eliminating Section 22.903 (in whole or in part), with the rulemaking to be completed on a highly expedited basis,<sup>1</sup> and
- (b) immediately, or in conjunction with the issuance of this new NPRM, provide the interim relief described below.

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<sup>1</sup> Such an NPRM could follow the expedited model used by the FCC in the Financial Interest and Syndication ("Fin-Syn") Rules proceeding after the 7th Circuit's decision in that matter. A copy of that NPRM is attached hereto at Exhibit 1 and an edited version which could be used in this proceeding is attached hereto at Exhibit 2.

II. **THE EXISTING RECORD: THERE IS NO NEED  
FOR STRUCTURAL SEPARATION IN CELLULAR**

- ° The FCC has received scores of (both solicited and unsolicited) comments regarding the efficacy of the BOC cellular structural separation rule in numerous proceedings over the several past years (including Docket Nos. CC-92-115, GN-93-252, ENF 93-44, CC-94-54, and CWD-95-5).
- ° The record developed in these proceedings plainly demonstrates both that:
  - (a) the benefits of this structural separation rule are clearly outweighed by the benefits which would flow from the elimination of the rule and the costs of maintaining the rule; and
  - (b) the objectives of the rule are being achieved through other, less burdensome means -- i.e., the existing non-structural

safeguards -- as the Commission has found in the case of PCS and, more generally, for CMRS.

- The new legislation has highlighted the need for elimination of the rule by removing the joint marketing restriction (see Section 601(d)) and leaving behind certain restrictions and obligations which merely impose costs on the BOCs without providing any benefits which are not otherwise achieved by the existing non-structural safeguards.

III. **THE 6TH CIRCUIT'S DECISION: PCS AND CELLULAR  
ARE THE SAME**

- The 6th Circuit focused its analysis on three key considerations:
  - (a) the Commission's own recognition of the similarities between PCS and cellular; (b) the absence of a reasoned basis for disparate treatment between the two services with respect to structural separation; and (c) the command of Section 332 of the Act (47 U.S.C. § 332, as amended by the Omnibus Budget Reconciliation Act of 1993) for regulatory symmetry among CMRS providers.

- The Court asked:

If [PCS] and Cellular are sufficiently similar to warrant the Cellular eligibility restrictions and are expected to compete for customers on price, quality and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers? Cincinnati Bell, supra, at p. 29.

- Indeed, in this proceeding, the Commission has taken the position that the similarity of PCS and cellular services was one of the primary reasons for its cellular bidding restrictions in the PCS auctions.<sup>2</sup>
- A number of factors demonstrate that PCS and cellular services are in fact identical:

A. THE NETWORK FUNCTIONS ARE IDENTICAL

1. Each network consists of a series of low power cell sites established throughout the FCC licensed area.

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<sup>2</sup> The recent filing by AirTouch, Comcast and Cox (see letters of January 18, 1996 to Chairman Hundt and General Counsel Kennard) erroneously suggests that the Sixth Circuit has ordered the FCC to reexamine its determinations in the Broadband PCS Order regarding structural issues involved in LEC (including BOC) provision of PCS. The Sixth Circuit did no such thing. The Commission has already completed that analysis. Rather, what the Sixth Circuit has done is to direct the Commission -- in the face of the decision that a LEC (including a BOC) can provide PCS -- to analyze the narrow question of whether it still makes sense to preclude a BOC from providing cellular service.

2. Each cell site will re-use frequencies utilized by the cellular or PCS operator in other parts of the network.
3. Each network will allow for the handoff of calls from cell site to cell site as customers move through the licensed area.
4. Each network will utilize the same type of switching equipment.

B. THE VENDORS RECOGNIZE THAT CELLULAR AND PCS ARE IDENTICAL

1. At a CTIA sponsored wireless forum (held in October of 1993), every major wireless manufacturer in the world acknowledged that cellular and PCS are identical services which merely operate at different frequencies. A list of the attendees at this forum is attached hereto at Exhibit 3. As summarized by Keith Rainer, SBMS's Director of Wireless Services:

"Each of the manufacturers represented agreed that PCS is cellular at a different frequency; PCS simply makes additional radio spectrum available for the offering of wireless mobile services." (Rainer Affidavit at p. 3)

2. All of the vendors agreed that the technical standards for PCS should be the same as cellular, simply upbanded from 800 MHz to 2 GHz.
3. The vendors stressed the possibility of dual mode (800 MHz/2 GHz) mobile phones and switches, and the need for a common air interface standard.
4. AT&T, for example, has developed a Number 5 ESS switch designed to be a platform on which both cellular and PCS networks can be built, and others are working on such platforms.



C. THE WIRELESS INDUSTRY AGREES THAT CELLULAR AND PCS ARE IDENTICAL

1. In a "PCS Handoff Waiver Request" recently filed with the DOJ, the Bell Companies argued that a Cellular Handoff Waiver, previously granted by Judge Greene, should be interpreted to apply to PCS because:

- "The Bell Companies' PCS networks will in all relevant respects, be cellular systems by another name."  
(Waiver Request at p. 6) (emphasis added)
- The PCS "networks will make use of a cellular architecture" by reusing frequencies. (Waiver Request at p. 6)
- "The relationship between cell sites and mobile switches will be the same. . . ." (Waiver Request at p. 6)

- "BOC PCS providers may use the very same network infrastructure equipment as cellular carriers." (Waiver Request at p. 7)
  - BOC PCS providers "will adopt the same technical standards" as cellular, including the IS-41 handoff standard. (Waiver Request at p. 7)
2. This Waiver Request was supported by Affidavits from various Bell personnel and representatives of numerous vendors.
3. The Cellular Telecommunications Industry Association ("CTIA"), in an affidavit of Tom Wheeler, its President and Chief Executive Officer, supported this Waiver Request, noting that:
- CTIA has a policy goal that "the vision of seamless North

American cellular service should be realized by adopting and implementing the IS-41 standard as quickly as possible." (Wheeler Affidavit at p. 2)

- "PCS carriers, just like cellular carriers, will use the IS-41 standard" to offer seamless services. (Wheeler Affidavit at p. 3)
- PCS and cellular are "likely to serve the same group of customers." (Wheeler Affidavit at p. 4) (emphasis in original)
- Disparate application of MFJ restrictions on BOC PCS and cellular operations would "harm consumers, who would be denied higher-quality, lower-cost services due to diminished competition among cellular and PCS providers." (Wheeler Affidavit at p. 4)

D. CELLULAR AND PCS PROVIDERS COMPETE FOR THE SAME CUSTOMERS

1. The services offered are the same, as evidenced, for example, by the Washington/Baltimore area customer brochures of Sprint Spectrum and Cellular One which are attached hereto at Exhibit 4.
2. The handsets utilized by customers will often work on both cellular and PCS networks.

IV. THE NEED FOR IMMEDIATE INTERIM RELIEF

- ° Whether the Commission proceeds on the basis of: (a) the voluminous record already before it regarding the lack of a need for the structural separation rule and the benefits which would flow from its elimination (as such record may be supplemented by a new, expedited request for comments in this proceeding), or (b) the rationale employed by the 6th Circuit regarding the similarity of PCS and cellular and the requirements of Section 332 of the Act, the result should be the same -- the elimination of the rule (in whole or in part).
- ° While SBC believes that the Commission already has before it ample evidence to eliminate Section 22.903 (in whole or in part) without further notice and comment, if the Commission decides that further comments are warranted -- a process which must be highly expedited in light of the 6th Circuit's decision -- the Commission should immediately grant various forms of interim relief.

- The interim relief which SBC (and others) seek at this time is necessary in light of the dynamic forces currently at work in the telecommunications marketplace, which will be greatly enhanced by the passage of the new legislation; these include:
  - (a) the fact that numerous competitors of the BOCs are offering various forms of combined services and "one-stop shopping", which the BOCs' customers want but which the BOCs may not now provide to their customers;
  - (b) the emergence of PCS which can be offered on an integrated basis with local exchange service; and
  - (c) the offering of wireless services (on a facilities-based and/or resale basis) by the large interexchange carriers.

- Such interim relief is further warranted since, even if the Commission were to conclude -- in connection with a new expedited comment process -- that some forms of separation between BOC local exchange and cellular services are appropriate, it is inconceivable that the FCC would continue to endorse the "maximum separation" requirements of Section 22.903, in light of the positions the Commission has taken in other recent proceedings; therefore, at least certain aspects of Section 22.903 should be waived and modified immediately so that the BOCs can respond to the current marketplace forces and provide the services their customers desire.
- The interim relief which SBC believes the FCC should grant immediately (or at the outset of a new, expedited comment process) includes:

- A. MOST IMPORTANTLY, a waiver -- applicable to all BOCs -- of the following subsections of § 22.903:
1. Subsection (b)(2) requiring separate officers;
  2. Subsection (b)(3) requiring the employment of separate operating, marketing, installation and maintenance personnel; and
  3. Subsection (b)(4) requiring the utilization of separate computer and transmission facilities.
  4. In addition, the Commission should amend the definition of "BOC" for purposes of subsection (d) to correspond to the definition in the prior Section 22.901, which defined a "BOC" as being the affiliate which provides the landline local exchange telephone service.<sup>3</sup>
- B. The extension of SBMS's CLLE waiver to the other BOC cellular affiliates.

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<sup>3</sup> The Rules provide that the Commission may grant such waivers and amend its Rules on its own motion. See 47 C.F.R. §§ 1.3 and 22.119.



- The grant of such interim relief will enable the BOCs immediately to bring to consumers the benefits of integrated services and one-stop shopping and service which the Commission has recognized on numerous occasions.
  
- Most recently, in its Memorandum Opinion and Order on Reconsideration of its order authorizing the transfer of McCaw's cellular licenses to AT&T (MO&O on Recon., File No. ENF-93-44, FCC 95-425 (released Oct. 30, 1995)), the Commission stated that:
  - (a) "We believe that the benefits to consumers of 'one-stop shopping' are substantial. . . ." (MO&O on Recon. at ¶ 15)